YAVAPAI COUNTY ATTORNEY'S OFFICE
JOSEPH C. BUTNER SBN 005229
DEPUTY COUNTY ATTORNEY
255 East Gurley Street
Prescott, AZ 86301
Telephone: 928-771-3344
ycao@co.yavapai.az.us

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, **Plaintiff,** **v.** **STEVEN CARROLL DEMOCKER,** **Defendant.**	**Cause No. P1300CR20081339** **Division 6** **STATE'S RESPONSE TO DEFENDANT'S MOTION TO EXCLUDE TESTIMONY OF GREGORY COOPER PURSUANT TO *ARIZONA RULES OF EVIDENCE,* RULE 702.**

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby submits its Response to Defendant's Motion to Exclude Testimony of Gregory Cooper Pursuant to *Arizona Rules of Evidence,* Rule 702 and requests that Defendant's Motion be denied. The State's Response is supported by the following Memorandum of Points and Authorities.

MEMORNDUM OF POINTS AND AUTHORITIES

I. Mr. Cooper is expressly qualified to give testimony regarding the signature aspect of the crime, the crime classification, the* modus operandi, *and victimology.

Arizona Rules of Evidence, Rule 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

education, may testify thereto in the form of an opinion or otherwise." "The party offering expert testimony must show that the witness is competent to give an expert opinion on the precise issue about which he is asked to testify." *Gaston v. Hunter,* 121 Ariz. 33, 51, 588 P.2d 326, 344 (Ariz. App. 1978).

Gregory Copper is an expert witness in crime scene analysis with over 30 years experience in law enforcement including ten years with the FBI serving in various investigative and supervisory positions. Mr. Cooper was Unit Chief of the FBI's National Center for the Analysis of Violent Crime, the FBI's Program Manager for the Violent Criminal Apprehension Program, and an FBI Criminal Profiler. Mr. Cooper taught Criminal Psychology and Death Investigation at the FBI National Academy on Quantico, VA., and has authored several books on criminal investigations, some of which have been used as college textbooks. Mr. Cooper has also instructed at the Utah Police Academy, University of Virginia, Boston College and Kaplan University. Mr. Cooper has consulted internationally with law enforcement agencies on over 1,000 cases including homicides, sexual assault, rape and serial rape, kidnapping, extortion and abduction as well as numerous other crimes.

Ariz. R. of Evid., Rule702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Crime scene analysis is specialized knowledge to which Rule 702 applies. Contrary to Defendant's assertions, Mr. Cooper, based upon his knowledge, skill, experience, training and education, is expressly qualified to assist the jury in determining what took place at the Bridal Path residence on the night of July 2, 2008, why it happened the way it did, and why the scene was staged.

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

Defendant claims that this type of opinion testimony is "routinely excluded" in Arizona courts. This is not the case. In fact, Arizona case law examining the validity of this type of crime scene analysis is extremely limited; however, a review of similar "behavior testimony" in Arizona case law and case law from other jurisdictions following the same standards of admissibility as Arizona's Rule 702 reveals that this type of testimony is relevant, can assist the jury, and individuals with knowledge, skill, experience, training and education similar to that of Mr. Cooper are qualified to offer expert testimony regarding crime scene analysis. *See Logerquist v. McVey,* 196 Ariz. 470, 1 P.3d 113 (2000) (expert testimony is admissible to explain behavior that a party claims is consistent or inconsistent with an alleged event); *State v. Speer,* 209 Ariz. 125, 98 P.3d 560 (2004) (the test applicable to opinion testimony based upon novel scientific principles advanced by others has no application when a qualified witness offers relevant testimony or conclusions based upon experience and observation about human behavior for the purposes of explaining that behavior); *Duvardo v. Giurbino,* 649 F.Supp.2d 980 (N.D. Cal. 2009) (admission of expert's crime analysis testimony is not a violation of due process as expert never identified defendant as killer and only said that killer was someone known to victim); *Wisconsin v. Swope,* 762 N.W.2d 725 (2008) (expert testimony of FBI agent about crime scene analysis, which included an opinion about the deaths of the victims, would assist the jury at trial where jury was required to resolve the homicides with no witnesses and where there was staging of the crime scene consistent with a homicide as it was beyond the everyday knowledge of the average jury to understand staging or to understand the implications of such evidence).

In *Logerquist v. McVey,* 196 Ariz. 470, 480, 1 P.3d 113, 123 (2000), the Arizona Supreme Court determined that "[o]pinion testimony on human behavior is admissible when

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

relevant to an issue in the case, when such testimony will aid in understanding evidence outside the experience of knowledge of the average juror, and when the witness is qualified." In *Logerquist*, the issue was whether the trial court's application of *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923), and resultant order precluding expert testimony of alleged repressed memory was proper. The *Logerquist* court determined that *Frye* was not applicable when the expert evidence is based on the qualified witness' own experience, observation and study. The Court, citing an earlier decision in *State v. Lindsey,* 149 Ariz. 472, 720 P.2d 73 (1986), held that:

> The trial judge has discretion to allow such expert testimony where it may assist the jury in deciding a contested issue, including issues pertaining to accuracy or credibility of a witness' recollection or testimony. The trial judge may exercise this discretion where there is a reasonable basis to believe that the jury will benefit from the assistance of expert testimony that explains recognized principles of social or behavioral science which the jury may apply to determine issues in the case. Testimony of this type is not to be permitted in every case, but only in those where the facts needed to make the ultimate judgment may not be within the common knowledge of the ordinary juror.

Logerquist at 476, 1 P.3d at 119. (citations omitted).

The *Logerquist* court also reviewed another case dealing with behavioral evidence. In *State v. Roscoe,* 145 Ariz. 212, 700 P.2d 1312 (1984), the Arizona Supreme Court held that "a dog handler's opinion on the alleged ability of his tracking dog to identify scent long after it was laid down was admissible and *Frye* inapplicable." *Logerquist* at 477, 1 P.3d at 120.

> It turned out that the witness presenting the dog-scent evidence in *Roscoe* was a charlatan. *See State v. Roscoe,* 184 Ariz. 484, 910 P.2d 635 (1996) (*Roscoe II*). But neither Rule 702 (with or without *Frye*), *Daubert/Kumho,* nor any other system can guarantee the validity of any particular evidentiary ruling. Just

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

> as the refusal to apply *Frye* to Preston's dog-scent evidence led to the admission of false testimony, so the application of *Frye* or *Daubert* could well have led to the exclusion of testimony from Einstein or Freud, both of whom advanced theories not generally accepted for many years. *See* CLIFFORD M. WILL, WAS EINSTEIN RIGHT? (1986).

Logerquist at 477, 1 P.3d at 120.

"Our cases forbid a witness from expressing an opinion on [ ] credibility or the truth of the allegations," however "[e]xpert testimony is admitted to explain behavior that a party claims is consistent or inconsistent with the alleged event." *Id.* at 480, 1 P.3d at 123. "There is an enormous difference in testimony identifying a person who bears certain characteristics as being more likely to have committed the offense and in testimony that the physical evidence of a crime indicates certain characteristics about the offense." *Simmons v. Alabama*, 797 So.2d 1134 (1999).

An examination of *Duvardo v. Giurbino,* 649 F.Supp.2d 980 (N.D. Cal. 2009), is a particularly revealing primer regarding this type of expert opinion testimony. In a federal habeas petition, the defendant claimed his "right to due process was violated by the admission of 'victimology' expert opinion evidence" and "by the admission of impermissible character evidence." *Id.* at 982-83. The defendant was convicted on two counts of first degree murder and two counts of elder abuse with what the California Court of Appeals described as "various threads of circumstantial evidence combined to make a quilted pattern of guilt" and had exhausted his state court remedies. *Id.* at 984. The victims were the defendant's parents. The defendant lived several hours away from his parents and claimed he had been working the day they were murdered. The only direct evidence was a kitchen towel found in a bathroom sink in the victims' home that had the defendant's blood on it, although the defendant did have

financial motive to kill his parents. He owed them $30,000, a debt which he told his wife had been satisfied.

> No signs of forced entry were found, meaning that the [victims] knew their assailant and let him in their home. Two experienced law enforcement officers, a detective and an FBI expert in crime scene reconstruction, believed the crime scene was staged. The expert opined the staging was done because the killer would be an obvious suspect and wanted to divert attention of the investigation to a hypothetical anonymous burglar.

Id.

The prosecution introduced expert testimony from Mark Safarik (Safarik), a crime scene analyst with experience and training strikingly similar to Mr. Cooper's. Safarik had been with the FBI's Behavioral Analysis Unit and his crime scene analysis included very violent homicides, serial sexual assaults, cases involving threats and cases where the cause of death was unknown. Safarik "specialized in assigning certain personality characteristics to behavior that occurred at a crime scene." *Id.* at 993. "[H]e did not, however, try to determine the particular person who committed the crime." *Id.* The sections of Safarik's report were labeled "Victimology," "Crime Scene Analysis," and "Offender Characteristics and Traits[1]." *Id.*

The "Victimology" portion examined the victims' background to determine "what was it about these victims or their situation which made them susceptible to becoming victims of a violent crime." *Id.* at 994. The victims had a fairly routine schedule and were described as friendly, personable and none of their family or neighbors "were aware of anyone who would want to do them harm." *Id.* Safarik determined that based upon these and other characteristics, the victims were very low risk and "statistically unlikely of being the victims of a violent

[1] The trial court determined that Safarik could not testify regarding the "Offender Characteristics and Traits."

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

crime" and it was "highly unlikely that the victims' deaths were at the hands of a total stranger." *Id.*

> Safarik offered six main opinions in this case that Petitioner protests: (1) the victims were at a low risk of becoming victims, (2) the killer was known to the victims and not perceived by them as a threat, (3) the burglary was staged to mislead law enforcement officers and divert attention away from someone close to the victims on whom suspicion might otherwise focus, (5) the killer acted with a high level of rage or anger toward the victims, and (6) the victims were killed between about 7:30 a.m. and 10:20 a.m. on March 31, 1999.

Id. at 995.

On appeal, defendant argued that Safarik's testimony regarding the character evidence of the victims and the murdered was enraged was improper, should have been subjected to a *Kelly/Frye* hearing, and was "improper expert testimony in that is was not beyond the common experience of the jury and amounted to improper opinion on guilt, and violated due process." *Id.* at 995. These arguments were rejected by the state appellate court. The habeas court noted the appellate court found the following:

> Special Agent Safarik was only adding to the jury's common knowledge his expertise of crime scene reconstruction. His task was to assist the jury in interpreting the physical characteristics of the crime scene. He brought to that task his experience in reviewing or investigating over 3,000 homicides. He did not testify to some fledgling scientific technique or to some "junk science" called "victimology." Indeed, what he dubbed "victimology" was only a small part of his testimony, and was only an analytical attempt to discover why Donald and Mary Ann Duvardo became homicide victims. His testimony was as old as Sherlock Holmes, and was properly admitted to help the jury understand certain characteristics of the crime scene. The expert testimony did not specifically address the guilt or innocence of the defendant, but provided information beyond the jurors' experience that the jurors were free to accept or reject.

Id. at 995-96 (citations omitted).

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

In its analysis of whether the testimony was properly admitted, the habeas court noted "[t]hat the state court may have decided the witness qualified as an expert does not end the matter, as there is room for habeas relief when expert testimony is mere quackery." *Id.* at 996. The court found that neither the admission of the Safarik's crime scene analysis testimony or the victimology evidence was a violation of due process and held that "Safarik's testimony was relevant to the issues in the trial." *Id.* at 997.

> Most jurors have a very limited exposure to real criminal activity. Safarik's testimony was helpful to the jury in that it provided meaning to some evidence presented to the jury. For example, although the jury could look at the pictures of the crime scene and perhaps see that there were cameras, radios and jewelry boxes in the pictures, Safarik was able to provide meaning and context that went beyond that ordinarily known to lay people, i.e., that these valuable being left behind suggested this was a staged burglary, and that ***total strangers don't have a reason to stage*** burglaries, ***which in turn suggested the killer was someone close to the victims***.

Id. at 998 (emphasis added).

Here, Carol was well-liked and none of her friends could imagine that anyone, other than Defendant, would want to cause her harm. The State has shown Defendant's motive for the murder was pecuniary gain. There is evidence that Defendant took a golf club to Carol's home just days before her brutal murder. The cover for a Big Bertha III, No. 7 wood golf club was observed by detectives in Defendant's garage at the time of executing the first search warrant in connection with this case. After discovering during the autopsy, which took place hours later, that the medical examiner believed the murder weapon potentially to be a golf club, the detectives returned to Defendant's garage with another search warrant to seize Defendant's golf clubs and discovered that the head cover had mysteriously disappeared from the shelf upon which it had been previously observed.

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

There were no signs of forced entry at Carol's residence. Defendant knew that Carol was a creature of habit and was well aware of her daily routine. Carol typically went for a run on a path behind her home after work. After her run she would fix dinner and most evenings spoke with her mother on the phone. There is evidence that on the night of her murder, Carol had just come in from her run and was fixing dinner while she on the phone with her mother. Carol's mother did not hear Carol's dogs bark when Carol said "Oh no" and the call disconnected. The State believes Defendant entered the home from the ranch land directly behind the home after he stashed his bicycle in the brush while Carol was out on her run. The crime scene was staged to make it appear that Carol's death was the result of a fall rather than a brutal murder. Mr. Cooper's testimony regarding his crime scene analysis and victimology in this case, just as Safarik's was in *Duvardo*, will be extremely helpful to the jury in giving meaning to these factors. His testimony should not be excluded.

II. Defendant's requests related to Mr. Cooper are nothing more than a fishing expedition. The State is not required to provide Defendant with documentation of anything and everything Mr. Cooper has ever touched, done or said.

Defendant compiled a veritable laundry list of items in relation to Mr. Cooper that he demands should be produced with the claim that such "information will assist in evaluating this prong of Rule 702." (Defendant's Motion, Pg. 7:23.) The State, pursuant to the rules of discovery, will provide all documents and other information associated with Mr. Cooper pertaining to this case as soon as they become available; however, from the sheer expansiveness of Defendant's list, it is clear the defense team is on little more than a fishing expedition. See *State v. Hatton,* 116 Ariz. 142, 150, 568 P.2d 1040, 1048 (1977) (discovery rules are not meant to be used for fishing expeditions). *See also Green v. Nygaard,* 213 Ariz. 460, 143 P.3d 393 (App.2006) (discovery rules are not meant to be used for wild fishing

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

expeditions); *Franzi v. Superior Court (Pima County),* 139 Ariz. 556, 679 P.2d 1043 (1984) (the superior court has the power to prevent fishing expeditions).

It is also evident that the defense team is seeking a word-by-word preview of Mr. Cooper's testimony. This too is unreasonable. Mr. Cooper will be available for a defense interview just as they interviewed expert witness Dr. Laura Fulginiti, Ph.D. Forensic Anthropologist. "The criminal discovery rules do not require the state to provide a word-by-word preview to defense counsel of the testimony of the state's witnesses." *State v. Wallen,* 114 Ariz. 355, 351, 560 P.2d 1262, 1268 (App.1997); *See also State v. Williams,* 183 Ariz. 368, 379, 904 P.2d 437, 448 (1995); *State v. Guerrero,* 119 Ariz. 273, 276, 580 P.2d 734, 737 (App.1978). These requests, specifically the request that all items listed should be disclosed within five days or risk preclusion, are unreasonable, unwarranted, and should be denied.

III. Mr. Copper's testimony should not be excluded pursuant to Rule 403. It will not be unduly prejudicial, will not confuse the jury and will certainly not be a waste of time.

Ariz. R. Evid., Rule 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." While Defendant claims unfair prejudice and confusion, the claims are based upon pure speculation, are legally unsupported and without merit. As such, the request for exclusion under Rule 403 should be summarily rejected.

CONCLUSION:

Whereas Mr. Cooper's report and testimony regarding his crime scene analysis and "victimology" will assist the trier of fact to understand the evidence and to determine the facts

in issue, his testimony should not be limited or excluded. Defendant's Motion should be denied.

RESPECTFULLY SUBMITTED this 22nd day of March, 2010.

Sheila Sullivan Polk
YAVAPAI COUNTY ATTORNEY

By: Jennifer M. Wilson pa
Joseph C. Butner
Deputy County Attorney

COPIES of the foregoing delivered this 22nd day of March, 2010 to:

Honorable Thomas J. Lindberg
Division 6
Yavapai County Superior Court
(via email)

John Sears
107 North Cortez Street, Suite 104
Prescott, AZ 86301
Attorney for Defendant
(via email)

Larry Hammond
Anne Chapman
Osborn Maledon, P.A.
2929 North Central Ave, 21st Floor
Phoenix, AZ
Attorney for Defendant
(via email)

By: Deb Cornell

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110